SOUTHERN DISTRICT OF NEW YORK
UNITED STATES DISTRICT COURT
______________________________________X

Eileen Henderson,

Plaintiff

04 CV 4553(CLB)(MDF)

-against-

AFFIRMATION OF SUSAN B. EGAN

Regeneron Pharmaceuticals, Inc.,

Defendant
______________________________________X

Susan B. Egan, duly admitted to practice before the courts of the State of New York, hereby affirms the following upon penalty of perjury:

1. I am counsel to plaintiff in the captioned action and have been since its inception. I submit this affidavit in opposition to defendant's motion for summary judgment, requesting its denial on the grounds that there are questions of fact which are for a jury to decide. I am admitted to practice in the State of New York and before the bar of this Court and fully familiar with the facts stated herein.

PRELIMINARY STATEMENT

2. Eileen Henderson was terminated from her employment at Regeneron on November 10, 2003. Defendant Regeneron claims that she was terminated because of a "long standing and ongoing pattern of failure to follow reasonable instructions from her supervisors and her lack of professionalism, including her pattern of recurrent latenesses and insubordination." Grimaldi Aff. ¶ 57.

3. In fact, Ms. Henderson's termination was the culmination of a concerted effort by Bobby Hoyt, her immediate supervisor, to get rid of her because she was not "one of the

guys", she complained to him all the time about being sexually harassed by the loading dock staff, and once she had gone to Human Resources about the treatment she was receiving on the loading dock, it was clear she could cause him and the rest of the all male staff on the loading dock trouble.

4. The amended complaint ("complaint"), copy of which is included in defendant's Exhibit Binder at Exhibit A, asserts claims for sexual harassment, sex discrimination, and retaliation under Title VII of the Civil Rights Act, 42 USC §§ 2000e et seq. and the New York State Executive Law §296(e) and for intentional infliction of emotional distress.

5. Defendant contends, basically, that it is entitled to summary judgment on each of Ms. Henderson's claims because none of the things that were done to her, and the defendant doesn't deny that they were done, had anything to do with sex or her gender. It further claims that it is, in any event it protected by the Supreme Court's decision in Faragher v. City of Boca Raton, 524 U.S. 775 (1998) because the conduct she reported first to Hoyt and then to Grimaldi (and again defendant does not deny that the reports were made) allegedly did not related to sex or her gender.

6. Specifically, defendant argues that Ms. Henderson cannot establish her claim of sex discrimination because none of the acts she contends are discriminatory are adverse employment actions and, in any event, discriminatory intent on Regeneron's part cannot be inferred from any of them. The actions defendant claims, incorrectly, are the basis for plaintiff's claim of discrimination are that: 1) Ms. Henderson was not provided with a pager; 2) she was not given a key of her own to the Shipping and Receiving Department and 3) she was denied the opportunity to do overtime. Def. Br. P. 5.

7. While all of these things happened to Ms. Henderson, they are not the basis of her claim of discrimination. Her claim of discrimination is based on the denial of overtime and upon her termination following her co-worker Michael Parker's attack on her. While Regeneron concedes that Parker attacked her and suspended him, along with Ms. Henderson, for his role in what defendant insists was just two staff members involved in verbal fisticuffs, she was fired and he was not. The instances Regeneron identifies as the basis of Ms. Henderson's claim of discrimination are but a few of the instances of the harassment and retaliation to which Ms. Henderson was subjected during her employment with Regeneron.

8. In its papers, defendant argues that Ms. Henderson cannot establish that she was subjected to a hostile environment because 1) she wasn't really troubled by what the men in the department did to her (Def. Br. P. 12), 2) the conduct was not sufficiently severe and pervasive to rise to the level of an actionable hostile environment (Def. Br. Pp. 13-14) and 3) because Regeneron had policies and practices which were intended to prevent and correct sexual harassment of which plaintiff failed to avail herself. (Def. Br. P. 17).

9. Once again defendant limits it analysis of whether the environment was adequately hostile to a few incidents. Def. Br. P. 12. In fact, the all male staff on the loading dock routinely engaged in conduct that would make any "reasonable" woman's hair stand on end. While defendant would like this court to ignore Ms. Henderson's description of what it was like to work on the loading dock on the grounds that it was not reported to Human Resources, as is set forth in the accompanying memo of law, for the purposes of summary judgment, the law requires that all instances described by Ms. Henderson as part of the hostile environment must be taken as true. Nor does the apparent "sexual neutrality" of some

of the events and statements render them any less pertinent to this court's assessment of whether the hostile environment was sufficiently severe and pervasive to be actionable.

10. Next, defendant claims that Ms Henderson cannot state a claim for retaliation. It argues that because Ms. Henderson's complaints to Gail Grimaldi, Regeneron's chief human resources officer, about her supervisor and co-workers did not relate to sex or gender, she was not engaged in a protected activity with respect to which defendant could retaliate. Def. Br. P. 18. Ms. Henderson disputes this characterization of what Ms. Grimaldi was told, otherwise knew, or should have known about the treatment Ms. Henderson was getting from her supervisor and co-workers. But more importantly, it completely ignores Ms Henderson's repeated reports and complaints to her supervisor Bobby Hoyt.

11. It is Hoyt who, immediately after Ms. Henderson reported him to Human Resources, began to create a paper trial of complaints about Ms. Henderson's performance about things she did that had never bothered him before. It was Hoyt who permitted the atmosphere on the loading dock to be so poisoned against Ms. Henderson that Parker's physical attack on her was not even surprising. It is Hoyt that hovered over her every move when she returned from her suspension and finally announced that he just couldn't put up with her any more. It is Hoyt that finally terminated her.

12. Nor, finally, defendant argues is Ms. Henderson entitled to damages for intentional infliction of emotional distress. It's claim that Regeneron's conduct was not "so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency" is presumably predicated on its truncated view, expressed in its opposition to Ms. Henderson's other causes of action, of just what happened to Ms. Henderson while she was employed at Regeneron. Here is what Ms. Henderson has said happened.

The Hostile Environment at Regeneron Was Sufficiently Severe and Pervasive to Alter Her Terms and Conditions of Employment

13. Eileen Henderson went to work for defendant in January 2001. She was hired to input data in the Shipping and Receiving Department. From January 2001 until Mike Parker and Eugene Thomas were hired at the end of 2002, she was the only woman in a staff of three men working in Shipping and Receiving. The three men were Bobby Hoyt, the supervisor of Shipping and Receiving, Joe Resi and Tyrone Gerald. The three men knew each other from an earlier job. In fact, Hoyt personally hired them both at Regeneron. Hoyt Tr. at 39.[1] By the time Ms. Henderson arrived at Regeneron Hoyt had known them both for at least 5 years, and went to football games with Resi from time to time. Plaintiff's App. Exh. A, Hoyt Tr. at 40.

14. In her complaint, Ms. Henderson alleges

> From the outset of her employment, the atmosphere in the department was like a men's locker room. It was the habit of the men in the department to wrestle each other, pick each other up and pin one another to the wall or the desk. Often the wrestling included grabbing each other by the testicles, commenting on their size and making other remarks referring to their sexual prowess. As the office was small and without partitions, the wrestling was physically threatening to plaintiff and the continual groping and sexual comments discomforting and upsetting.
>
> Def. Binder Exh. A, Complaint ¶ 9.

15. At her deposition, Ms. Henderson described this kind of conduct as occurring all the time almost from the beginning of her employment with Regeneron. Def. Binder Exh. C, Henderson Tr. at 437.

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[1] Hoyt's transcript is annexed to Plaintiff's Appendix as Exhibit A.

16. Ms. Henderson testified that she repeatedly complained to her supervisor, Hoyt, about the roughhousing, Def. Binder Exh. C, Henderson Tr. at 438, but that he paid no attention. Indeed, he was a participant. Though all the male members of staff deny engaging in any locker room talk or antics, Hoyt going so far as to say that nothing went on in Shipping and Receiving that he wouldn't have been perfectly happy to have his 12 year old daughter observe, Plaintiff's App. Exh. A., Hoyt Tr. at 23, Jose Monegro corroborates Ms. Henderson's account. See Monegro Declaration. See Def. Binder Exh. C, Henderson Tr. at 434.

17. In addition, a "quickmovie " taken by Joe Resi shows Hoyt horsing around with a co-worker in the Shipping and Receiving office. Def. Binder Exh. C, Henderson Tr. at 436. It pictures Hoyt grabbing his co-workers breast and leering lasciviously as though he was "copping a feel" of the breast of a passing women. Frames from the quickmovie are included in Plaintiff's App. as Exh. B. A disc showing the entire quickmovie is in Plaintiff's App. as Exh. C.

18. Tyrone Gerald, who was the subject of sexual harassment complaint after Ms. Henderson termination, was a problem for Ms. Henderson too. See Plaintiff's App. Exh. D, Gerald Tr. at 51.

> Q. Prior to 2003, would you describe to me what it was that you experienced that you believed was sexual harassment?
>
> A. But I didn't know at the time it was sexual harassment. Tyrone had a hand problem. Tyrone Gerald had a hand problem.
>
> Q. And what was his hand problem?
>
> A. He likes to touch, but I didn't know at the time that that is considered sexual harassment. I never knew that.
>
> Q. Now, at the time -- prior to 2003 you said Tyrone touched you?

> A. Yes.
>
> Q. How did he touch you?
>
> A. He would -- my back, like just touching my back, and I told Bobby that. Tell Tyrone to keep his hands to himself.
>
> Def. Binder Exh. C, Henderson Tr. at 148:3-21

19. Gerald naturally denies doing anything of the kind, but when I asked his co-worker, Eugene Thomas whether he had ever seen Gerald touch Ms. Henderson, he said, "plenty of times," just a friendly pat on the shoulder. Plaintiff App. Exh. E, Thomas Tr. at 24.

20. Gerald also regularly regaled Ms. Henderson with tales of lap dancing at the "Golden Lady", a strip club in the Bronx. When questioned about the Golden Lady, Gerald could not remember whether he told Ms. Henderson about the lap dancing, Plaintiff's App. Exh. D, Gerald Tr. at 40-41, but Ms. Henderson recalls. Henderson Dec. ¶ 13.

21. Henderson tried hard to fit in with this group of old friends and co-workers and did not bring their locker room antics to the attention of Gail Grimaldi, though it was discomforting and upsetting. Complaint ¶ 9. She didn't want to cause trouble and get a whole lot of people involved. Def. Binder Exh. C, Henderson Tr. at 438.

22. When Mike Parker and Eugene Thomas were hired at the end of 2002, the environment in the Shipping and Receiving Department grew even more hostile. Parker and Thomas were, in Ms Henderson's view rough characters, and they frightened her. Def. Binder Exh. C, Henderson Tr. at 200-203. Henderson Dec. ¶ 16.

23. As the complaint explains, Def. Binder, Exh. A ¶ 11, one time when she was complaining about the locker room antics after Parker and Thomas got there, Parker dismissed her complaint stating that "she was just mad because they were not doing it to her." Def. Binder Exh. C, Henderson Tr. at 440.

24. Parker also did the following:

> He told Henderson, leering at her, that she needed a "man" like him and that he was going to take her out and treat her "like a lady". He commented that she looked sexy and howled like a wolf causing the other men in the department to laugh. He rubbed her back and told her she needed a massage to relieve the tension. Henderson told him not to touch her. She told him not to ask personal questions. She complained to her supervisor and asked him to tell her co-worker to keep his hands to himself but he failed and refused to do so.

Def. Binder Exh. A. Complaint ¶ 12. See also Def. Binder Exh. C, Henderson Tr. at 441-2.

25. The men in the Department also made fun of the way Ms. Henderson looked. They described her as fat, made fun of her missing tooth and of her hair. Def. Binder Exh. A, Complaint ¶ 13 and Def. Binder Exh. C, Henderson Tr. at 442-3. One time, Ms. Henderson entered the shipping and receiving office only to find the screen of her computer covered with yellow post-its, each with a penis on it. Henderson Dec. ¶ 13.

26. It is ridiculous to characterize this kind of experience, as defendant does, as a "few isolated sexual comments or incidents of touching" insufficiently severe or pervasive to state a claim for sexual harassment under Title VII. Def. Br. P. 14. By any standard, subjective or objective, the environment in Shipping and Receiving for the only woman in the department was severely and pervasively hostile.

27. Defendant contends that Ms. Henderson cannot meet the subjective test for hostile environment because Ms. Henderson testified that she experienced only "a little bit" of sexual harassment at Regeneron. Def. Br. P. 12. In the first instance, it must be noted that Ms. Henderson is not a lawyer and did not know whether particular conduct satisfies the test for sexual harassment. She specifically testified that she did not understand that some of

what was being done to her was sexual harassment. See e.g. Def. Binder Exh. C, Henderson Tr. at 148 and Henderson Dec. ¶ 18.

28. That she describes herself as experiencing sexual harassment "a little bit" cannot be treated as an admission that she wasn't "subjectively" offended by the conduct in the face of all of the other evidence that she was. For instance, she repeatedly complained to her supervisor Hoyt about the conduct. Henderson Dec. ¶ 14. She complained to Grimaldi in Human Resources that the language in Shipping and Receiving was profane and not respectful and that she wasn't being treated "like a lady". Henderson Dec. ¶ 15. When she was unable to bring the conduct to a halt, Ms. Henderson tried to find a job in another department. Henderson Dec. ¶ 19.

29. Though her choice of words may not be expert, even in the sections of her testimony quoted by defendant, Ms. Henderson states that the locker room conduct made her "uncomfortable." The space was small. Plaintiff states that when it was going on in the dining area, she would leave the dining area and go into the office because, "I hear it, but I don't have to see it." Def. Binder Exh. C, Henderson Tr. 439:19. Ms. Henderson has a high school education. Her choice of words may not precisely express what she means to say.

30. Further, Ms. Henderson was plainly more than "a little bit" troubled by Mike Parker's attack on her. Regeneron employees who were there at the time described her as "very upset." Dr. Andrew Levin, the forensic psychologist who examined Ms. Henderson for plaintiff, explaining his diagnosis of post-traumatic stress disorder stated:

> Mike Parker's assault of Ms. Henderson on 10/8/03 fulfilled the trauma criteria because it involved both actual and threatened bodily injury. In addition, during the assault, the plaintiff experienced feelings of fear and horror.
>
> Def. Binder Exh. D. P 22.

31. Here is how Eugene Thomas, one of her co workers described Ms. Henderson when she returned to work after Mike Parker's attack.

> Q. And after they came back, did you make any observations about --
>
> A. She was a little moodier.
>
> Q. A little moodier?
>
> A. Yes.
>
> Q. What about Mike Parker?
>
> A. He looked okay to me.
>
> Q. How was Eileen's moodiness evident to you?
>
> A. Body language.
>
> Q. What was it about her body language that seemed moodier to you?
>
> A. She just wasn't the same as she used to be.
>
> Plaintiff's App. Exh. E, Thomas Tr. at 37:18-38:7

Ms. Henderson Did Report Her Harassment

32. Under Regeneron's Sexual Harassment policy, employees with complaints are directed to report them to their supervisors.

> If an employee experiences or witnesses sexual or other unlawful harassment in the workplace, he or she should report it immediately to a supervisor. If the supervisor is unavailable or they believe it would be inappropriate to contact that person, he or she should immediately contact the Human Resources Department or any other member of management.
>
> Def. Binder Exh. O

33. Ms Henderson did complain about the harassment to her supervisor, Hoyt. For instance, she complained to him about the sexual roughhousing many times. Def. Binder Exh. C, Henderson Tr. at 438:17. She reported Gerald's "hand problem" to Hoyt and told him to tell Gerald to keep his hands to himself. Def. Binder Exh. C, Henderson Tr. at 148:11. She told Hoyt about Mike Parker's touching her and making sexual comments. Def.

Binder Exh. C, Henderson Tr. at 150. She testified that she told "Bobby everything", Def. Binder Exh. C, Henderson Tr. at 149:13, except when he was watching it happen. So when Thomas complained to Ms. Henderson that she was not behaving like "one of the guys" she didn't report it to Hoyt because he was sitting right there. Def. Binder Exh. C, Henderson Tr. at 445:3.

34. Ms. Henderson also reported her mistreatment to Gail Grimaldi in Human Resources. Ms. Grimaldi insists that Ms. Henderson never advised her that "she considered anything her co-workers said or did to be sexually harassing," Grimaldi Aff. ¶ 58. Nevertheless, she acknowledges that Ms. Henderson complained to her that "she was a lady and that they [male members of the staff] shouldn't speak to her disrespectfully." Plaintiff's App. Exh. F, Grimaldi Tr. at 107:5-11. Grimaldi acknowledges that Ms. Henderson complained to her often about the language used by the men in the department. Plaintiff's App. Exh. F, Grimaldi Tr. at 110:8–111:7.

35. But Grimaldi considered such language just "rough". It was not disrespectful as Ms. Henderson said it was, but "unprofessional". Plaintiff's App. Exh. F, Grimaldi Tr. at 111:24. Grimaldi took no action in response to Ms. Henderson's complaint. She told her "to go back and tell them I don't want people to speak to me this way." Plaintiff's App. Exh. F, Grimaldi Tr. at 112:11.

36. Throughout 2003, Grimaldi knew from her many conversations with Ms. Henderson that Ms. Henderson was experiencing considerable financial stress. In fact, she had sent Ms. Henderson to Regeneron's EAP to help her deal with her financial problems. Plaintiff's App. Exh. F, Grimaldi Tr. at 209:18. She knew that Ms. Henderson's son was experiencing some behavioral problems and that she was involved in a rent strike over her

landlord's failure to make necessary repairs to her apartment. Plaintiff's App. Exh. F, Grimaldi at Tr. at 129. Ms. Grimaldi acknowledges that Ms. Henderson visited her often and "confided" in her. Plaintiff's App. Exh. F, Grimaldi Tr. at 112:22. Though Ms. Grimaldi was perfectly willing to and did assist Ms. Henderson with these problems, she paid no attention to what Ms. Henderson had to say about the way Ms. Henderson was being treated in Shipping and Receiving.

37. Ms. Grimaldi's attitude to plaintiff's complaints of sexual harassment being suffered by Ms Henderson undoubtedly reflects defendant's attitude toward sexual harassment in the work place in general. Though Ms. Grimaldi asserts that defendant has a "zero tolerance" policy, in fact it is not.

> A. Zero tolerance.
>
> Q. What do you mean by zero tolerance?
>
> A. If it is truly sexual harassment, by that I mean it's serious, it's pervasive, and the person has been told to stop and been warned, then it becomes sexual harassment, and that person would be terminated.
>
> Q. So that it's not zero tolerance, it's after a warning and failing to correct their conduct, then they might be terminated, is that correct?
>
> Plaintiff's App. Exh. F, Grimaldi Tr. at 19:10-21

38. After Ms. Henderson's termination, another woman at Regeneron made a complaint against Tyrone Gerald for sexually harassing her at a holiday party. Gerald reported that after the complaint, he met with Grimaldi and others and was reprimanded for his conduct. He was told that any further such conduct would have "serious" consequences. Plaintiff's App. Exh. D, Gerald Tr. at 56:2-15.

39. It is clear from the memo that Ms. Grimaldi prepared for her file respecting this incident, a copy of which is included in Plaintiff's App. as Exh. G, that Gerald had harassed this employee in the past. As the memo notes:

> Katherine said she knows Tyrone for a relatively long time. He kids around a lot, but this was too much. She said Tyrone has discussed his personal problems with her in the past. He has frequently said, "we ought to hook up sometime, or maybe we can go for a drink, or maybe we can have dinner." At first, Katherine said she didn't want to be rude so she sidestepped the question. She told him "I don't think so". In the last several weeks though, Katherine stated the she had responded "no" very clearly to his advances.

40. Though Gerald's conduct at the Holiday Party was clearly part of a pattern of conduct, Grimaldi said nothing to Gerald about the pattern or the wrongfulness of his other contacts with this woman.

41. Under these circumstances, it is hardly surprising that in Ms. Grimaldi's tenure at Regeneron, which has more than 700 employees, there have been only three reported incidents of sexual harassment, only one of which Ms. Grimaldi felt had any basis. Plaintiff's App. Exh. F, Grimaldi Tr. at 17:20-18:6. It is evidently something defendant does not take seriously. Though defendant would undoubtedly argue that the low number of incidents of sexual harassment is testament to the effectiveness of it sexual harassment program, the low numbers can as easily be said to demonstrate that its program is totally ineffective. People will not report sexual harassment if they do not feel their employer is committed to preventing it.

42. It was, in any event, unreasonable to expect Ms. Henderson to say anything more to Ms. Grimaldi than she did during 2003. Ms. Grimaldi was not responsive to the complaints Ms. Henderson made about not being treated "like a lady". Indeed, she encouraged Ms. Henderson to take care of it herself.

Hoyt Retaliated Against Plaintiff
For Complaining to Human Resources
About His Misconduct

43. On February 12, 2003, after Parker and Thomas had joined the staff, Ms. Henderson went to Grimaldi's office and told her that she thought she was treated disrespectfully and unfairly by Bobby Hoyt. Plaintiff's App. Exh. F, Grimaldi Tr. at 106. She complained about being treated differently than her male co-workers in a variety of ways, including that she did not have a pager or keys to the office as her co-workers did and she was not being given the same opportunity to do overtime. She also complained that she was being treated disrespectfully. Joe Resi screamed at her and called her a bitch and Bobby Hoyt did nothing to stop him.

> A. He was like "What is so fucking funny. Why are you if you canning laughing?" (sic) So when I turned around I said -- no, he said "What is so fucking funny. Why the fuck are you laughing." I said Joe no. There is no one laughing at you, and I thought the comment you made was funny, but I said you don't have to curse at me. And Bobby was sitting right there. Bobby didn't turn his back, lift a brow or anything, so I was hurt. So I gave Joe -- I didn't say it to him, but I gave Joe to that afternoon to apologize to me for speaking to me that way. He did not. The next day came, which was the 13th, the next day came, I said he has until 12 o'clock to apologize to me for speaking in that manner either him or Bobby, somebody. If not, I am going straight to Gail Grimaldi, and I am going to report this, and that is what I did, and I was very upset and hurt.
>
> Def. Binder Exh. C, Henderson Tr. at 174:14-175:11

44. As a result of this report, Bobby Hoyt met with his two direct supervisors, Mike Kaplan and Joanne Deyo. Plaintiff's App. Exh. A, Hoyt Tr. at 54. Until this point Hoyt had never before been reported to Human Resources by any member of his staff. Plaintiff's App. Exh. A, Hoyt Tr. at 51. At this meeting, Hoyt was directed to meet with Ms.

Henderson. Hoyt memorialized his meeting with Ms. Henderson in a memo. Def. Binder Exh. U.

45. Less than a month after his meeting with Ms. Henderson, where he assured her that she had done a "good job" for the department, Def. Binder Exh. U, Hoyt began sending notes to Ms. Henderson's personnel file and others concerning her alleged misconduct. Such memos were sent;

March 7, 2003, Def. Binder Exhibit W
March 20 and March 21, Def. Binder Exh. X
April 3 and April 4, Def. Binder Exh. Y
April 4, Def. Binder Exh. Z
April 7, Def. Binder Exh. AA
April 8, Def. Binder Exh. BB
April 14. Def. Binder Exh. FF
June 3, Def. Binder Exh. GG
June 11, Def. Binder Exh. HH
June 16, Def. Binder Exh. II
June 17, Def. Binder Exh. JJ
October 7, Def. Binder Exh. MM
October 17, Def. Binder Exh. NN
October 17, Def. Binder Exh. OO

46. According to documentation prepared by Joanne Deyo in connection with the decision to terminate Ms. Henderson, Plaintiff's App. Exh. F, Grimaldi Tr. at 77, in the two years Ms. Henderson had worked at Regeneron prior to February 12, there were only two memos to her file. Def. Binder Exh. UU.

47. Hoyt's review of Ms. Henderson's performance in 2002 rated her in November of that year as "Fully Achieves Expectations and Standards". See Plaintiff's App.

Exh. H at p. D000292. Hoyt said of Ms. Henderson three months before he started noting her alleged misconduct for the file.

> Eileen has improved from a year ago, she takes her position more seriously than in the past. Giving her more responsibility will come in time, as my confidence grows in her. This year I was able to have her perform more functions, something I could not have done a year ago.

48. As Ms. Henderson testified, after she reported Hoyt to Grimaldi,

> A. I don't know. Ever since after Joe Resi cursed at me and Bobby did nothing to address that issue or just, you know -- I noticed that everything went down hill from there.
>
> Q. What went down hill?
>
> A. Just the relationship that we had. You know, just it wasn't the same any more. I didn't get that respect. You know, I wasn't getting that respect any more. It just shall -- it just seemed like it was getting worse and worse and worse and worse and worse.
>
> Def. Binder Exh. C, Henderson Tr. at 153:13-25

Defendant's Reasons for Terminating
Ms. Henderson Were Pretextual

49. Defendant claims that it terminated Ms. Henderson because of "her long standing and ongoing pattern of failure to follow reasonable instructions from her supervisors and her lack of professionalism, including her pattern of recurrent lateness and insubordination." The litany of purported infractions are laid out in Ms. Grimaldi's affidavit and in Exhibits noted in defendant's binder. As noted earlier, apart from two incidents, one in 2001 and one in 2002, the litany does not begin until Ms. Henderson complained to Grimaldi about Hoyt.

50. Even as stated, the litany does not provide evidence that Ms. Henderson was insubordinate or unprofessional. Setting aside for the moment that portion of the litany that relates to Mike Parker's assault on Ms. Henderson discussed below, the rest of her crimes

was approved by Hoyt. Plaintiff's App. Exh. A, Hoyt Tr. at 62:15-24. See. Henderson Dec. ¶ 21.

52. Moreover, though other members of the staff in Shipping and Receiving were undoubtedly late from time to time, or absent for personal reasons, Hoyt did not send a memo to their file. See Henderson Dec. ¶¶ 20-29.

Ms. Henderson's Termination Was Discriminatory

53. On October 8, 2003, Ms. Henderson was physically attacked by her co-worker Mike Parker. Both she and Mr. Parker were suspended and returned to work on October 17. Three weeks later, Ms. Henderson was fired and Mr. Parker was not. Ms. Henderson's termination was the culmination of Hoyt's campaign to get Ms. Henderson fired, in retaliation for reporting his misconduct to Ms. Grimaldi and because he decided that having a woman on staff interfered with his freedom to run his department like a locker room.

54. Let there be no doubt about who was responsible for Ms. Henderson's termination.

> Q. Who made the decision to terminate Eileen Henderson?
> A. That was my decision.
> Plaintiff's App. Exh. A, Hoyt Tr. at 79:24-80:2

55. Though many others were involved in Ms. Henderson's termination, it was Hoyt who made the decision. See also Plaintiff's App. Exh. F, Grimaldi Tr. at 201:18-202:20.

56. Regeneron maintains that there was nothing sexual about Parker's attack on Ms. Henderson. Def. Br. P.13. However, the attack was preceded by repeated incidents of sexual harassment by Parker. He asked her about her private life, told her she needed a man like him who could treat her like a lady. He touched her, touched her hair, rubbed her back,

commented that she looked sexy and howled like a wolf causing the other men in the department to laugh at her. Def. Binder Exh. C, Complaint ¶ 12. All of this was done in an environment in which such conduct was not only condoned, but encouraged at least insofar as Supervisor Hoyt made it a point not to stop it. Indeed, it may be that without an atmosphere poisonously disrespectful of women in Shipping and Receiving, the incident might not have happened.

57. Ms. Henderson testified that she and Mr. Parker were talking about whether Ms. Henderson was free to take the peanut butter home when Mr. Parker did not honor his promise to bring the bread. Def. Binder Exh. C, Henderson Tr. at 282:3-284:23. Parker was seated in the dining area next to the Shipping and Receiving office. Ms. Henderson was there as well putting peanut butter on her bread with a plastic knife. When Mr. Parker shouted to Eugene Thomas who was not in the room, "Yo, Gene, piss in that fucking peanut butter. As a matter of fact, throw that shit away. I'll buy a whole case" and called Ms. Henderson a "bitch", Def. Binder Exh. C, Henderson Tr. at 284:24-285:9, Ms. Henderson told him she would go to HR if he continued to talk to her in that way. At that point, Parker lunged at Ms. Henderson, slamming her against the copier machine and then using his body, kept slamming her against the copier machine until Resi and Thomas came into the room and pulled Parker away. Def. Binder Exh. C, Henderson Tr. at 285. When Parker lunged, Ms. Henderson raised her arms to protect her head and some peanut butter on the plastic knife she had been using to make her peanut butter sandwich got on Parker's face and shirt.

58. After Joe Resi and Eugene Thomas pulled Mike Parker off Ms. Henderson, she ran into the office and tried to reach HR to get some help. There was no answer. Voicemail came on. Parker got free from Thomas and Resi and came running into the office

after Ms. Henderson. Joe Resi told Ms. Henderson to leave but she was afraid Mike Parker might break loose again and follow her. Henderson Dec. ¶ 32.

59. Parker, Thomas and Resi were first interviewed by Joanne Deyo and Mike Kaplan, the managers of the Facilities Department to whom Hoyt reported. Mike Kaplan's notes of those first meetings with Joanne Deyo's handwritten comments interspersed are included in Plaintiff's App. as Exhibit I. These notes disclose that Resi stated that "Mike looked very angry and if the situation were to escalate Mike could become violent." A handwritten note inserted by Joanne Deyo states, "Resi stated that MP lunged towards EH. Joe was afraid MP would hit". One of Deyo's handwritten insertions states that while Parker first denied pushing Ms. Henderson, he then admitted pushing her once, but only after the peanut butter had been put on his face. In these notes, Resi is quoted as saying that he had to pull Parker away from Ms. Henderson.

60. Eugene Thomas told Jose Monegro that he had to grab Parker because he thought Parker was going to beat Ms. Henderson up. He told Monegro that Parker was so angry he almost couldn't hold him down. See Monegro Dec. ¶ 7.

61. Following this event, defendant held plaintiff as responsible for the fight as the attacker and suspended them both without pay. No inquiry was made whether plaintiff was injured. No thought was given to whether it was safe for plaintiff to work in the same work area as her attacker. No consideration was given to what the psychological impact on plaintiff of such an attack might have been. Henderson Dec. ¶ 35. Indeed, no thought appears to have been given to plaintiff at all. Rather, the defendant seems to have concluded that plaintiff provoked the attack and that the attack was therefore somehow justified.

62. It is clear from Grimaldi's testimony that Regeneron had concluded that Henderson had lied about being attacked and that she had provoked Parker.

> Q. She was surprised that you suspended her?
>
> A. She was surprised that we had suspended her without pay. And again I think financially this was really something that was going to hurt. But I think at this point it's something that really needed to be a strong impact that this was not acceptable behavior in the workplace.
>
> Q. What was it about Eileen's conduct that was unacceptable?
>
> A. Smearing peanut butter on someone's face, the shouting, I don't know. Again, this was a situation that was given to me. It was a big thing of unacceptable behavior. There was language, there was shouting, there was she said, he said; he did that, I did that. It was not from the witnesses saying, yes, something had happened. Yes, it was terribly inappropriate. And it shouldn't happen again. And that was what I told Eileen. I said it cannot happen again, this is not the way to behave in the workplace.
>
> Q. So by Friday morning you concluded that she smeared the peanut butter on his face?
>
> A. He still had the peanut butter on his face when he came in the office. When I saw him, he still had peanut butter in his eyes.
>
> Q. But if Mike Parker had lunged at her while she was making a peanut butter sandwich, she might have lifted up her arm like this and peanut butter may have been --
>
> MS. KRAUSS: Objection.
>
> A. Basically what I believe, I got something for you, I got something for you, Mike, and I'm going to give it to you. And I do believe Joe Resi -- I'm trying to think, but I do believe, I understood from the conversation, and it sounded like Joe had -- Eileen had said something, I guess this was where I had gotten it from, probably Mike's conversation, that I got something for you. And she kept on putting the knife in front of his face. And again when I say -- go back to these types of situations, it's a he said-she said. It happens too fast. There was enough things there that said to me both were involved, both needed to be suspended.
>
> Plaintiff's App. Exh. F, Grimaldi Tr. at 169:21-171:24

63. Thus, Mike Parker's attack on plaintiff was treated by Regeneron as a crude argument between two people using "unacceptable" language that had been provoked when plaintiff smeared peanut butter on Parker's face. Alternate explanations, which acknowledged the risk at which Parker's conduct put plaintiff or just the possibility that he had physically attacked her, seem not to have been seriously considered. Standing alone, Regeneron's analysis of the situation was discriminatory.

64. Parker and plaintiff were each suspended without pay. They were both ordered to take anger management classes. But Parker did not take his anger management course. Grimaldi felt that the counseling he was doing in connection with the death of his wife was enough. Plaintiff's App. Exh. F, Grimaldi Tr. 210:7. It also true that Ms. Henderson did not do her anger management classes but that was because Regeneron fired her before she had a chance to do them.

65. Though Regeneron contends that it was not Henderson's involvement in the hostile "argument" with Mike Parker that resulted in her termination, its alleged reasons for terminating her, her "long standing and ongoing pattern of failure to follow reasonable instructions from her supervisors," were evidently pretextual. See Henderson Dec. ¶¶ 20-29.

66. Thomas testified that after the suspension, word was out that Henderson was on her way out. He wasn't surprised when she was fired.

> A. Because it was, I don't know, it was a bunch of running to human resources, a bunch of things that was going on, so I didn't -- so I -- it wasn't surprising to me.
>
> Q. You knew something was going --
>
> A. Something was going on, it was too much. I couldn't keep up with it because I had work to do.
>
> Thomas Tr. at 39:17-24

67. After returning from her suspension, Ms. Henderson reported to Grimaldi that she knew she was going to be fired because her co-workers were singing "bye-bye baby" to her. Grimaldi Tr. at 191:10-192:7 .

Defendant's Failure to Provide
Ms. Henderson With an Opportunity to
Do Overtime Was Also Discriminatory

68. Shipping and Receiving didn't have any overtime. However, the Facilities Department did. When Facilities had overtime to give out, Mike Kaplan came to Shipping and Receiving and asked Eugene Thomas, Tyrone Gerald and Mike Parker whether they wanted to do the overtime. One did not go to Mike Kaplan for overtime. That wasn't the procedure. Kaplan came to Shipping and Receiving and gave it out to whom he pleased when he had the overtime to give. He never asked Ms. Henderson whether she was interested in doing overtime. Henderson Dec. ¶ 8.

69. If Ms. Henderson overheard Kaplan talking to her co-workers about overtime, she would ask Kaplan to include her. Henderson Dec ¶ 8. He always had an excuse why he couldn't give it to her. Henderson Dec. ¶ 8. Ms. Henderson testified that Kaplan only gave her overtime on that one occasion. That overtime was consistently provided to the men in her department and not to her is sufficient to permit an inference of discrimination, given that defendant offers to no reason for excluding Ms. Henderson from overtime opportunities other than her purported failure to ask.

70. The evidence is that Ms. Henderson both wanted and needed overtime. Henderson Dec. ¶ 9. During 2003, Ms. Henderson was experiencing serious financial difficulties, severe enough to seek a loan from Regeneron. The difficulties persisted throughout the year until her termination requiring her at one point to seek an advance of her

discrimination, given that defendant offers to no reason for excluding Ms. Henderson from overtime opportunities other than her purported failure to ask.

70. The evidence is that Ms. Henderson both wanted and needed overtime. Henderson Dec. ¶ 9. During 2003, Ms. Henderson was experiencing serious financial difficulties, severe enough to seek a loan from Regeneron. The difficulties persisted throughout the year until her termination requiring her at one point to seek an advance of her salary. When she was unable to get overtime, Ms. Henderson went out and got herself a part time job first at UPS and then at Sam's Club. Henderson Dec. ¶ 9. She left those jobs, not because as defendant tries to suggest, that she really didn't need the money, (Def. Br. P. 8). but because they were too much. After a full day of work, both jobs had her hauling inventory and stock off the trucks and around the premises.

71. Regeneron's refusal to provide Ms. Henderson with the same opportunity to do overtime that it provided to her male co-workers was discriminatory.

CONCLUSION

72. There is surely nothing in this record that supports the conclusion that defendant is entitled to summary judgment on any of Ms. Henderson's claims.

New York, New York
June 8, 2005

Susan B. Egan